



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *R. B. v Canada Employment Insurance Commission*, 2019 SST 909

Tribunal File Number: AD-19-532

BETWEEN:

**R. B.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

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Leave to Appeal Decision by: Janet Lew

Date of Decision: August 26, 2019

## DECISION AND REASONS

### DECISION

[1] The application for leave to appeal is refused.

### OVERVIEW

[2] The Applicant, R. B. (Claimant), worked for several years at an athletic and recreational facility. In December 2018, his employer dismissed him for misconduct. The Claimant applied for Employment Insurance regular benefits but the Respondent, the Canada Employment Insurance Commission (Commission), denied his application for benefits, citing misconduct.<sup>1</sup> The Commission did not change its mind on reconsideration.<sup>2</sup> The Claimant appealed the Commission's reconsideration decision to the General Division, which dismissed the appeal. The Claimant maintains that he was a good employee and that his employer wrongfully dismissed him.

[3] The Claimant is now seeking leave to appeal the General Division's decision, on the ground that the General Division failed to observe a principle of natural justice, and based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. I have to decide whether the appeal has a reasonable chance of success.

[4] I am not satisfied that the appeal has a reasonable chance of success and I am therefore refusing the application for leave to appeal.

### ISSUES

[5] The issues before me are as follows:

**Issue 1:** Is there an arguable case that the General Division failed to observe a principle of natural justice?

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<sup>1</sup> See Commission's letter dated February 18, 2019, at GD3-72 to GD3-73.

<sup>2</sup> See Commission's reconsideration decision dated April 2, 2019, at GD3-77 to GD3-78.

**Issue 2:** Is there an arguable case that the General Division based its decision on an erroneous finding of fact when it found that the Claimant's employer warned him that he had to update his certification or face dismissal?

**Issue 3:** Should the Social Security Tribunal consider the Claimant's complaint with a human rights tribunal?

## ANALYSIS

[6] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that the Claimant's reasons for appeal fall into at least one of the three grounds of appeal listed in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). The appeal also has to have a reasonable chance of success.

[7] The only three grounds of appeal under subsection 58(1) of the DESDA are:

- (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[8] A reasonable chance of success is the same thing as an arguable case at law.<sup>3</sup> This is a relatively low bar because claimants do not have to prove their case; they simply have to show that there is an arguable case. At the actual appeal, the bar is much higher.

**Issue 1: Is there an arguable case that the General Division failed to observe a principle of**

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<sup>3</sup> This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

**natural justice?**

[9] The principle of natural justice referred to in the subsection refers to the fundamental rules of procedure that apply in judicial or quasi-judicial settings. The principle exists to ensure that all parties are treated fairly, in the sense that they receive adequate notice of any proceedings, that they have a full opportunity to present their case, and that proceedings are fair and free of bias or the reasonable apprehension of bias. Natural justice relates to issues of procedural fairness, rather than the outcome of a decision and how it might affect a party.

[10] There was an in-person hearing before the General Division. The Claimant does not suggest that he did not get a fair hearing. He does not allege, for instance, that the General Division member failed to provide him with adequate notice, that the member deprived him of an opportunity to present his case, or that it was biased or appeared to be biased against him. For this reason, I am not satisfied that there is an arguable case that the General Division failed to observe a principle of natural justice.

**Issue 2: Is there an arguable case that the General Division based its decision on an erroneous finding of fact when it found that the Claimant's employer warned him that he had to update his certification or face dismissal?**

[11] The Claimant argues that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner when it found his employer warned him that if he did not update his certification, he faced dismissal for misconduct. In particular, he argues that the General Division misinterpreted the employer's warning letter dated November 19, 2018.<sup>4</sup>

[12] For misconduct, a person had to have acted deliberately or was so reckless as to approach wilfulness. As well, he had to have known that he could lose his job because of his actions or inaction, or a reasonable person would understand that someone would probably lose their job if they acted the same way. It is irrelevant that the person was a good employee otherwise and that they might have won awards for their work. If someone loses their job because of misconduct, they are disqualified from receiving Employment Insurance benefits.

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<sup>4</sup> The employer's warning letter is at page GD3-24 of the General Division file.

[13] In this case, the Claimant argues that he could not have known that he was at risk of losing his job. In particular, he says that his employer's letter did not warn him that he could face dismissal if he did not update his certification. He argues that the General Division was wrong when it interpreted his employer's letter as a warning that he would lose his job if he did not update his certification.

[14] On top of that, the Claimant says that he could not have known that he could lose his job if he did not update his certification because there were other employees who continued working even though they did not have the appropriate certification.<sup>5</sup>

[15] The Claimant expected that the employer would treat all employees equally. He views unequal treatment as political persecution and a violation of his human rights. He advises that he is pursuing a human rights claim against his employer in this regard.

[16] The General Division wrote:

The employer gave the Claimant a warning letter on November 19. The letter says that the updated power engineer certificate is a requirement from TSBC. The letter also says that the employer talked about the requirement to update the certificate with the Claimant many times before setting the deadline. **The letter says that they will fire the Claimant if he does not update his certificate by December 2.** The Claimant argues that he did not accept the terms in the warning letter. However, he agrees that the employer gave him the warning letter.

(My emphasis)

[17] While there may have been other employees who continued working despite lacking the appropriate certification or ticket, in the Claimant's case, he received a warning a letter from the employer. The subject line of that letter read "Written warning – Suspension." It is clear that the employer intended to give a warning to the Claimant.

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<sup>5</sup> See Claimant's letter at GD3-50.

[18] If the employer's letter indeed warned the Claimant that he faced dismissal if he failed to update his certification, then the Claimant cannot rely on the fact that others worked without the appropriate certification to say that he did not know his employer could let him go from his job.

[19] The employer wrote:

... You have since informed us that you will submit your renewed certification to management by the December 2, 2018 deadline and understand that failure to do this will result in termination of your employment ...<sup>6</sup>

[20] The Claimant says he did not consider this a warning. He argues that the General Division was wrong to interpret this as a warning.

[21] I do not see how the phrase, "failure to [submit your renewed certification to management] will result in termination of your employment ..." could serve as anything else but a warning that the Claimant risked dismissal if he did not renew or update his certification and inform the employer that he had done so. The employer also noted in the letter that the Claimant had to obtain recertification or renewal of his 4<sup>th</sup> Class Power Engineer ticket to be compliant with provincial regulations. This apparently was one of the conditions of his employment.

[22] Additionally, the employer wrote in the same letter that discipline would result in a 3-day suspension without pay (but it would consider that he had already served this suspension). The employer then stated that it would place the letter on the Claimant's file for 24 months. If there were any future disciplinary incidents, that would "result in further progressive discipline, up to and including termination of [the Claimant's] employment."

[23] The Claimant has not offered any alternative interpretation of the warning letter. I see no other reasonable interpretation of the letter.

[24] I am not satisfied that there is an arguable case that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner, when it

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<sup>6</sup> See second page of employer's letter dated November 19, 2018, at issue 5, on page GD3-24.

interpreted the employer's letter of November 19, 2018, as a warning that the Claimant would face dismissal if he did not update or renew his certification.

**Issue 3: Should the Social Security Tribunal consider the Claimant's complaint with a human rights tribunal?**

[25] The Claimant asserts that his employer persecuted him for his political beliefs. He has filed a complaint with a human rights tribunal. He argues that the Social Security Tribunal needs to consider his complaint with the human rights tribunal. However, the Social Security Tribunal does not have the authority to consider and decide the nature of such complaints. This is not an appropriate ground of appeal under subsection 58(1) of the DESDA.

[26] I note that the Claimant has filed large portions of the General Division hearing file with his application to the Appeal Division. If he is asking me to reconsider and reweigh the evidence and to give a more favourable decision, subsection 58(1) of the DESDA does not allow for a reassessment or a rehearing of the matter.

**CONCLUSION**

[27] The application for leave to appeal is refused.

Janet Lew  
Member, Appeal Division

REPRESENTATIVE:	R. B., Self-represented
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